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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1395

JOHN PAUL SHELTON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT R. CRITTENDEN
103 Avenue A, N.W.
P. O. Box 152
Winter Haven, Florida 33880
Telephone (813) 293-2161

ATTORNEY FOR PETITIONER

BRUCE L. WHITMER
100 Colony Square, Suite 305
1175 Peachtree Street, N.E.
Atlanta, Georgia 30361
Telephone (404) 892-7782

OF COUNSEL

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IN THE
SUPREME COURT OF THE UNITED STATES
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JOHN PAUL SHELTON,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

John Paul Shelton, Petitioner, prays for the issuance of a writ of certiorari, to the United States Court of Appeals for the Fifth Circuit, to review an Order of that Court dated February 24, 1975 (petition for rehearing denied April 7, 1975), denying Petitioner's motion to reinstate a direct appeal, in a federal criminal case.

OPINION BELOW

The Order, denying petitioner's motion to reinstate appeal, for which review is sought, was issued by the United States Court of Appeals for the Fifth Circuit on February 24, 1975, Case No. 73-1776 in that Court. It has not yet been officially reported. The Order denying the petition for rehearing was issued April 7, 1975.

The above cited orders are printed in the Appendix to this petition at pages 1a and 5a, respectively.

JURISDICTION

The statutory provision conferring jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C., §1254(1). The judgment of the Court of Appeals which is now sought to be reviewed was entered February 24, 1975 and the order denying the petition for rehearing was entered April 7, 1975, thereby concluding the case in the court below.

QUESTION PRESENTED FOR REVIEW

Petitioner timely perfected a direct appeal to the Court of Appeals, and filed brief on the merits, following conviction and sentence in the United States District Court for the Northern District of Georgia. Thereafter the Government moved to dismiss appeal, "without prejudice to the appellant's right to reopen his appeal at some subsequent date", on ground that Petitioner, after filing brief, had become a fugitive on an unrelated state charge. The motion to dismiss was granted by the Court of Appeals. Less than fourteen months later, the Petitioner, having been taken into federal custody, and having entered upon service of sentence, filed a motion in the Court of Appeals to reinstate appeal. Although the Government did not file an opposition, the motion was denied.

Question: Can petitioner, who has lost his right to appeal during his status as a fugitive, reinstate his appeal upon return to custody.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

FIFTH AMENDMENT, UNITED STATES CONSTITUTION

" * * * nor be deprived of life, liberty, or property, without due process of law."

28 U.S.C., §1291

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."

LOCAL RULE 6 OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

"Practice. Where not fixed by statute or rule the practice shall be that heretofore customarily followed in this court."

STATEMENT OF THE CASE

On February 2, 1973, in the United States District Court for the Northern District of Georgia, petitioner was sentenced to serve a term of five years, following jury conviction for violation of the National Motor Vehicle Theft Act. Petitioner was released on appeal bond. He perfected an appeal to the lower court. On June 1, 1973, he timely filed his brief on the merits, by mail.

That same day, while being tried on an unrelated state charge (forgery) in Atlanta, Georgia, he absented himself from the trial, just prior to the Court's charge to the jury. No "escape" was involved, as that word is ordinarily used. Petitioner had appeared voluntarily at the state trial. He was not under physical restraint, neither was he under the legal restraint of any warrant, summons, or appeal bond. The state trial was concluded in his absence. He was sentenced in absentia; whereupon, the state court issued a warrant for his arrest.

On June 15, 1973, the Government filed a motion in the lower court to dismiss the appeal, "without prejudice to the appellant's right to reopen his appeal at some subsequent date," on the ground that Petitioner was a fugitive in the unrelated state case.

On August 2, 1973, the lower court entered an Order conditionally dismissing the appeal, and directing Petitioner to show cause at a hearing in the District Court why the conditional Order should not be made final. *United States v. Shelton*, 482 F.2d 848 (5th Cir. 1973), *cert. den.* 414 U.S. 1075 (1973). Petitioner did not appear at this hearing, but was represented by counsel who contended Petitioner had not breached the terms of his federal appeal bond, which contained no geographical limitations.

On November 12, 1973, the lower court, in an unreported order, made the above-mentioned conditional order final. Again, this Court denied certiorari. *Shelton v. United States*, 415 U.S. 976 (1974).

On December 25, 1974, Petitioner was arrested by federal authorities. On December 30, 1974, he entered upon service of the subject sentence. He is now confined in the United States Penitentiary, Atlanta, Georgia.

On January 10, 1975, Petitioner, through counsel, filed a motion to reinstate appeal in the Court of Appeals, on the ground that the reason for dismissal (fugitivity) no longer existed. (App. 7a). The Government did not oppose the motion.

On February 24, 1975, the motion to reinstate appeal was denied. (App. 1a).

Petition for rehearing was timely filed (App. 14a), and was denied April 7, 1975 (App. 5a).

Petitioner's affidavit, explaining and attempting to show mitigating circumstances, including medical problems, surrounding his fugitivity, was attached to the petition for rehearing (App. 21a). A certified medical report was filed in the Court of Appeals, as an exhibit, to substantiate petitioner's affidavit relative to medical problem. (App. 28a). This affidavit was in response to an observation of the Court of Appeals, in the last paragraph of the Order, sought to be reviewed on certiorari, that Petitioner had given "no explanation for his conduct".

The jurisdiction of the Court of Appeals is based on 28 U.S.C., §1291.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

1.

By analogy, the decision below, refusing to reinstate the Petitioner's appeal, is in conflict with *Illinois v. Allen*, 397 U.S. 337 (1970), where this Court held that a defendant lost the right to be present at his trial because of disruptive conduct, but further held:

> "Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." 397 U.S., at 343.

2.

In the interest of judicial economy, and to avoid possibility of collateral attack, this Court should order the appeal reinstated, as in *Gaca v. United States*, 411 U.S. 618 (1972).

3.

The lower court's refusal to reinstate appeal, without first determining the factual question as to whether Petitioner intentionally waived the right of appeal, is in conflict with the principle of *Johnson v. Zerbst*, 304 U.S. 458 (1938), that it is only where there is an "intentional relinquishment or abandonment of a known right or privilege", that an effective waiver can be found.

4.

The appeal should be reinstated in interest of fair play and due process, because the language of the Government's motion to dismiss, and prior rulings of the lower court in similar cases, led Petitioner to believe, and caused his attorney to advise, that Petitioner would have the "right" to reinstatement of appeal upon termination of fugitivity. The Government had requested dismissal without prejudice to Petitioner's "right" to reopen it at a later date. The lower court, in a similar case, *United States v. Brown*, 456 F.2d 1112 (5th Cir. 1972), had ordered Brown's appeal stricken from the docket because of his fugitivity, but reinstated the appeal upon a showing that Brown had been taken into custody in New York. The lower court had also held, in *McKinney v. United States*, 403 F.2d 57 (5th Cir. 1968), that McKinney did not irrevocably lose right of appeal by virtue of an escape, stating: "It is settled that an appeal from a judgment of a federal district court is a matter of right . . ." 403 F.2d, at 59. In refusing to reinstate Petitioner's appeal the lower court has deviated from its own practice, in contravention of its Local Rule 6, which provides: "PRACTICE. Where not fixed by statute or rule the practice shall be that heretofore customarily followed in this court."

5.

The decision below is in conflict with *Starke v. United States*, 338 F.2d 648 (4th Cir. 1964), in that, the lower court denied the motion to reinstate appeal without first ordering an evidentiary hearing to determine

whether Petitioner had intentionally waived his right of appeal. This Court should resolve the conflict between the Circuits. In *Starke*, an appeal from denial of a motion under 28 U.S.C., §2255 was dismissed, after counsel failed to respond to the Court's communication, to file a brief or to appear for oral argument. The Court of Appeals for the Fourth Circuit held that before it could act on an application to reinstate appeal, it would refer the matter to the District Court, for an evidentiary hearing to determine the "factual question" of whether there was an knowledgeable waiver of the right to appeal.

ARGUMENT

The lower court in denying petition for rehearing erroneously relied on *Estell v. Dorrough*, 43 U.S. L.W. 3497 (March 17, 1975), where this Court upheld the validity of a Texas statute, providing that a convicted person, who escapes from custody after filing notice of appeal, forfeits his right of appeal. There is no comparable federal statute, or rule.

The lower court cited numerous federal decisions, headed by *Molinaro v. New Jersey*, 396 U.S. 365 (1970), as authority for dismissing the appeal of a fugitive without waiting to see if he might be returned or recaptured. However these cases throw no light on the present narrow issue; that is, whether, upon the fugitive's return or recapture, the appeal should be reinstated, particularly in a case where there is no finding, and no evidence, of a knowing waiver of the right of appeal.

This Court in *Molinaro* said nothing that prevents reinstatement of an appeal under the proper cir-

cumstances. To the contrary, this Court said that an escape "does not strip the case of its character as an adjudicable case or controversy", 396 U.S. at page 366.

None of the cases cited by the lower court hold that an appeal dismissed because of fugitivity should not be reinstated, upon termination of said fugitivity. "Unconditional" dismissal does not necessarily mean "irrevocable".

The principal reason given for dismissing a fugitive's appeal is that he is in a position to comply with the court's decree only if it is favorable to him. Once the fugitivity has terminated, that justification for such treatment no longer exists.

Under rationale of *Illinois v. Allen, supra*, Petitioner should be able to reclaim his right of appeal, now that he is in custody, and the rationale for suspending his right of appeal is no longer valid. In *Allen*, this Court said:

> "Although mindful that courts must indulge every reasonable presumption against loss of constitutional rights, Johnson v. Zerbst, 304 U.S. 458, 464 (1938), we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behaviour, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful that his trial cannot be carried on with him in the courtroom [footnote omitted]. Once lost, the

> right to be present can, of course, be *reclaimed* as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." [Emphasis added]. 397 U.S., at 343.

"Present federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter of right . . .". *Coppedge v. United States*, 369 U.S. 438, 441 (1962).

The appeal should be reinstated in the interest of judicial economy. Since Petitioner's fugitivity did "not strip the case of its character as an adjudicable case or controvery", *Molinaro, supra*, the issues attempted to be raised on appeal could be made the basis for a collateral attack under 28 U.S.C., §2255. Such an eventuality was expressly recognized by this Court in the post-*Molinaro* case of *Gaca v. United States*, 411 U.S. 618 (1972), where this Court ordered an appeal reinstated in the Court of Appeals for the Third Circuit, where the Government did not oppose same, ". . . in order to avoid possible injustice and the possibility of collateral attack upon the conviction." 411 U.S., at 618.

With respect to "possible injustice" it should be noted that Petitioner's appeal is not based on mere technicalities or frivolous issues. Petitioner stated in his affidavit in the lower court that he anticipates eventual "complete exoneration" (App. 21a, et seq.). His brief on the merits in the lower court indicates the existence of substantial questions of law. A copy of

said brief was lodged with this Court in *Shelton v. United States*, 415 U.S. 976 (1974).

The Court of Appeals was under a misapprehension of fact, both in dismissing the appeal, and in refusing to reinstate it. The court erroneously stated that Petitioner "escaped" from state custody. The true facts, not disputed by the Government, are related in Petitioner's affidavit in the court below as follows:

> "On May 4, 1973, after the appeal in the instant case had been docketed in this Court, a six-count forgery indictment was returned against affiant in the Superior Court of Fulton County, Georgia, Case No. A-16925. Affiant was advised by counsel of the existence of the indictment, and appeared voluntarily for arraignment and trial on May 29, 1973, although no warrant or summons had been issued on said indictment, and no bond had been required or posted. Affiant remained in voluntary attendance at the state trial four days, until 4:30 p.m. on Friday, June 1, 1973, at which time he absented himself, during a recess, intending to return the following Monday prior to completion of the trial. At the time he absented himself, closing argument of counsel had been completed, but the trial judge had not yet charged the jury. Affiant did not anticipate that the jury's deliberation would commence before Monday.
>
> . . .

> "On Saturday, June 2, 1973, affiant was surprised and dismayed to learn that in his absence, the trial judge had submitted the case to the jury, a verdict of guilty had been returned, and a forty year sentence had been imposed in absentia". (App. 23a).

While the manner in which Petitioner became a fugitive may not be of great significance, it is impossible to say whether, or to what extent, the Court of Appeals was influenced by its misapprehension regarding Petitioner's "escape". And while Petitioner's explanation of why he did not immediately surrender to state or federal authorities may not constitute the defense of "necessity", it at least renders his conduct less culpable, and removes any possible implication of violence.

The Court of Appeal's observation that Petitioner had "flagrantly abused" the court's processes is not supported by the record. Petitioner, through counsel had sought no more indulgence or consideration than the lower court had extended to a recent fugitive of international notoriety. In *United States v. Brown*, 456 F.2d 1112 (5th Cir. 1972), the Court of Appeals had ordered the appeal stricken from the docket because the ". . . appellant, H. Rap Brown, has disappeared and his present whereabouts are unknown", 456 F.2d at 1114, fn. 1. Subsequently the lower court granted Brown's motion to reinstate his appeal, upon a showing that he had been taken into custody in New York. Similarly, in *McKinney v. United States*, 403 F.2d 57 (5th Cir. 1968), the Court of Appeals held that McKinney did not irrevocably lose his right of appeal

because of an escape, stating: "It is settled than an appeal from a judgment of a federal district court is a matter of right." 403 F.2d, at 57.

Brown, and *Illinois v. Allen*, are classic examples of defendant-appellants who "flagrantly abused" the court's processes, yet their objectionable behaviour, upon being terminated, did not prevent them from reclaiming their constitutionally protected rights, which had been suspended during the period of the objectional conduct.

Equal protection, as well as due process, is involved here. The practice of the lower court should be the same in Petitioner's case as it was in *Brown* and *McKinney*. In *Coppedge v. United States, supra*, this Court condemned the unequal practice of the United States Court of Appeals for the District of Columbia, in screening *in forma pauperis* appeals for frivolity, but in not so screening paid appeals. In so holding this Court stated:

> "if the practice of the Court of Appeals is to defer rulings on motions to dismiss paid appeals until the Court has had the benefit of hearing argument and considering briefs and an adequate record, we hold it must no less accord the poor person the same procedural rights." 369 U.S., at 448.

Petitioner should have been afforded the same "procedural rights" that the Court of Appeals for the Fifth Circuit afforded the appellants in *Brown* and *McKinney*; that is, reinstatement of appeal upon termination of fugitivity.

The court's refusal to reinstate appeal could be justified only on a finding that Petitioner intentionally waived his right of appeal. There is no basis in the record for any such finding. To the contrary, the record shows that Petitioner has left no stone unturned in attempting to have his appeal considered on the merits. This petition is his third to this Court. Petitioner was advised by counsel, and had every right to believe, that upon termination of his fugitivity he would be able to reclaim his "right" of appeal. Such was the holding of the recent Court of Appeals decisions in the Fifth Circuit in *Brown* and *McKinney*, reinforced by Local Rule 6 of the Fifth Circuit.

It is only where there is an "intentional relinquishment or abandonment of a known right or privilege" that an effective waiver can be found. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

If the lower court entertained any notion of waiver, it should have ordered an evidentiary hearing for a factual determination. In *Starke v. United States*, 338 F.2d 648 (4th Cir. 1964), an appeal from denial of a motion under 28 U.S.C., §2255 was dismissed, after counsel failed to respond to the Court's request, to file a brief or to appear for oral argument. The Court of Appeals for the Fourth Circuit held:

> "Before we can act upon an application to reinstate the appeal, we must have the answer to a factual question * * * whether there was an understanding waiver of the right to appeal can be determined only after a plenary hearing, during which Starke and his former at-

torney may both testify. We will refer this factual question to the District Court, with the request that it be heard expeditiously, and that the testimony and findings thereon be reported back as soon as possible thereafter." (338 F.2d, at 649).

CONCLUSION

For the foregoing reasons it is respectfully requested that the writ of certiorari be issued, and the case be remanded to the court below, with instructions to reinstate the appeal.

Respectfully submitted,

ROBERT R. CRITTENDEN
103 Avenue A, N.W.
P. O. Box 152
Winter Haven, Florida 33880
Telephone (813) 293-2161

ATTORNEY FOR PETITIONER

BRUCE L. WHITMER
100 Colony Square, Suite 305
1175 Peachtree Street, N.E.
Atlanta, Georgia 30361
Telephone (404) 892-7782

OF COUNSEL

CERTIFICATE OF SERVICE

I certify this 7th day of May, 1975, that I have served three copies of the foregoing petition for writ of certiorari, and the attached appendix, on the United States, by mailing same, postage prepaid, to Hon. Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C.

BRUCE L. WHITMER
100 Colony Square, Suite 305
1175 Peachtree Street, N.E.
Atlanta, Georgia 30361
Telephone (404) 892-7782

OF COUNSEL

APPENDIX

UNITED STATES of America, Plaintiff-Appellee,

v.

John Paul SHELTON, Defendant-Appellant.

No. 73-1776

United States Court of Appeals,
Fifth Circuit.

Feb. 24, 1975.

Appeal from the United States District Court for the Northern District of Georgia.

Before BELL, GODBOLD and INGRAHAM, Circuit Judges.

GODBOLD, Circuit Judge:

The petitioner John Paul Shelton moves to reinstate his appeal which was unconditionally dismissed November 12, 1973.

Shelton was convicted in the United States District Court for the Northern District of Georgia of interstate transportation and concealment of a stolen motor vehicle and on February 2, 1973 was sentenced to two concurrent five-year terms. He filed notice of appeal to this court, and the District Court granted him release pending appeal under a $5,000 bond with surety.

June 1, 1973, Shelton escaped from custody of the State of Georgia while a state court jury was deliberating at his trial on charges of forgery. He was found guilty on the forgery charges, his state bond was forfeited and a bench warrant issued. The day of the escape his pro se brief in the appeal from the federal conviction was filed in this court.

June 18 the District Court held a hearing in response to a motion by the U.S. Attorney that Shelton show cause why his appeal bond should not be revoked or forfeited. He did not appear nor was he represented by counsel. The District Court determined that it lacked jurisdiction to order the forfeiture.

The United States then filed in this court a motion to revoke or forfeit Shelton's appeal bond and to dismiss the appeal on the basis that he had absconded and defied the authority of this court. An attorney, who did not represent Shelton in the trial of the federal charge or of the state charge, filed a response to the government's motions contending that Shelton had neither breached the condition of the federal bond nor evidenced any intent not to obey the judgment of this court.

Recognizing our power and authority to dismiss the appeal of an escapee, we held:

> In this instance the custody filed is that of another sovereign and upon a charge unrelated to that embraced in the federal appeal. We conclude, however, that the escape from state custody, the subsequent state conviction, the revocation of the

> state bond, the fact that Shelton remains at large despite the existence of the state bench warrant, and the fact that the response filed in this court contains no indication of his whereabouts nor any affirmative averments that he intends to submit himself to jurisdiction of this court or of the State of Georgia, constitute sufficient probable cause for this court to conclude that appellant will not comply with orders of this court and will abide its decree only if favorable to him. We therefore conditionally revoke his appeal bond and conditionally dismiss his appeal.

United States v. Shelton, 482 F.2d 848, 849 (CA5), cert. denied, 414 U.S. 1075, 94 S.Ct. 591, 38 L.Ed.2d 482 (1973). To be certain that Shelton's rights were protected we made the dismissal conditional, as set out above, and we remanded the case to the District Court with directions that it issue an order directing Shelton to appear in person (and by counsel if he wished) to show cause why the conditional dismissal should not be made final. The District Court issued such an order and served it as directed by us. Shelton did not appear. The attorney who had filed the response did appear but gave no explanation for Shelton's failure to appear, stating that he had been in telephonic contact with Shelton but was not aware of his whereabouts. The District Judge found that sufficient cause had not been shown and concluded that there was no reason why the conditional revocation of the appeal should not be made final. A transcript of these proceedings was certified to us, and on November 12, 1973, we ordered our previous conditional order made final and unconditional and the appeal bond revoked and the appeal dismissed.

December 25, 1974 Shelton was arrested in Orlando, Florida. He then filed through still another attorney, of Orlando, the motion to reinstate that is now before us.

In Molinaro v. New Jersey, 396 U.S. 365, 90 S.Ct. 498, 24 L.Ed.2d 586 (1970), the Supreme Court shifted its own practice and unconditionally dismissed the appeal of a fugitive without waiting to see if he might return or be captured. Cf., Eisler v. United States, 338 U.S. 189, 69 S.Ct. 1453, 93 L.Ed. 1897 (1949); Smith v. United States, 94 U.S. 97, 24 L.Ed. 32 (1876); Bohanan v. Nebraska, 125 U.S. 692, 8 S.Ct. 1390, 31 L.Ed. 854 (1887). *Eisler* and some other earlier cases had left the suspicion that the Court might find an absolute right to appeal following return from fugitive status. See McKinney v. United States, 403 F.2d 57 (CA5, 1968); for other pre-*Molinaro* cases see United States v. Dawson, 350 F.2d 396 (CA6, 1965) and Stern v. United States, 249 F.2d 720 (CA2, 1957). Since then, however, every circuit that has heard appeals from fugitives has dismissed unconditionally, either waiting a reasonable time for the fugitive to surrender himself, United States v. Tremont, 438 F.2d 1202 (CA1, 1971), or prospectively dismissing unless defendant-appellant should surrender within a reasonable time, usually 30 days, United States v. Eberhardt, 467 F.2d 578 (CA5, 1972); United States v. Swigart, 490 F.2d 914 (CA10, 1973) ("final dismissal" after 30 days); Brinlee v. United States, 483 F.2d 925 (CA8, 1973); United States v. O'Neal, 453 F.2d 344 (CA10, 1972). Cf., Fratus v. United States, 496 F.2d 1190 (CA5, 1974), in which this court dismissed without prejudice if appellant showed he was not actually a fugitive. In Van Blaricom v. Forscht, 490 F.2d 461, at 462 (CA5, 1974), we referred to

the discretion of this Court not to reach the merits of an appeal where the petitioner is not available and subject to any judgment which might be entered in the case.

If a court retains any discretion after *Molinaro*, the facts and circumstances which we have set out make clear that such discretion should not be exercised here. Shelton has flagrantly abused the processes of this court and of the District Court. When we first received Shelton's appeal, we remanded to give him an opportunity to surrender, which he did not do. The situation is similar to that in which a petitioner's appeal is conditionally dismissed, subject to reinstatement if within a reasonable time he makes it known to the court that he is available and subject to any judgment which might be entered, and petitioner fails to do so, suffers a dismissal, and then later seeks reinstatement with no explanation for his conduct.

The motion to reinstate is denied.

ORDER DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

FILED APRIL 7, 1975

(Formal Parts Omitted)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC (Opinion Feb. 24, 1975, 5 Cir., 1975, ____ F.2d ____). (April 7, 1975)

Before BELL, GODBOLD and INGRAHAM, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED. *Estelle v. Dorrough*, ___ U.S. ___, 43 L.W. 3497 (March 17, 1975). No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

MOTION TO REINSTATE APPEAL

(Filed January 10, 1975)

(Formal Parts Omitted)

Comes now the Appellant, John Paul Shelton, through his counsel, and shows unto the Court as follows:

1.

On November 12, 1973, this Court entered an Order dismissing the appeal in the above styled cause, on the grounds that Appellant was a fugitive in an unrelated state (Georgia) case.

2.

Appellant is not now a fugitive, having been arrested on December 25, 1974. Appellant presently is in the custody of the United States Marshal in Orlando, Orange County, Florida, and, on December 30, 1974, entered upon the service of the five year sentence imposed in the above styled case, by the United States District Court for the Northern District of Georgia, Atlanta Division, Case No. 27,314.

3.

Appellant's brief on the merits of his appeal to this Court was timely filed herein on June 1, 1973. Substantial constitutional issues are raised in said brief, which is, by reference, incorporated herein.

4.

The principal issues raised in this appeal would be cognizable in a motion to vacate sentence pursuant to 28 U.S.C. 2255. However, the issues could more economically and expediently be resolved by reinstating the appeal and deciding these issues on the merits, as a proceeding brought pursuant to 28 U.S.C. 2255 would entail more time and expense for both parties as well as for this Court and the subject District Court. Moreover, it is suggested that this Court would be ultimately obliged to consider the constitutional issues and hand down a ruling on the merits, in either event.

5.

Authority for reinstating this appeal under the circumstances shown is found in the following cases:

Gaca v. United States, 411 U.S. 618, 93 S.Ct. 2156, 36 L.Ed.2d, 541, 542;

Coppedge v. United States, 369 U.S. 438, 442, 82 S.Ct. 917, 8 L.Ed.2d 21, Text 26;

Molinaro v. United States, 396 U.S. 365, 90 S.Ct. 948, 24 L.Ed.2d 586, Text 588;

McKinney v. United States (5 Cir. 1968), 403 F.2d 57, Text 58, 59;

United States v. H. Rap Brown (5 Cir. 1972), 456 F.2d 112, Text 113-114, and Footnote 1, Text 1114.

6.

Submitted herewith in support of this motion is appellant's memoranda of argument and authorities.

7.

The premises considered, Appellant moves the Court to reinstate the appeal in the above cause and decide same on the merits.

Respectfully submitted,

CRITTENDEN & CRITTENDEN.
P.A.

/s/ ROBERT R. CRITTENDEN
Robert R. Crittenden
103 Avenue A, N.W.
P. O. Drawer 152
Winter Haven, Florida 33880
Telephone (813) 293-2161
ATTORNEY FOR APPELLANT

AFFIDAVIT OF COUNSEL

I hereby certify that the matters set forth in the above and foregoing Motion to Reinstate Appeal are true and correct to the best of my knowledge and belief.

/s/ ROBERT R. CRITTENDEN
Robert R. Crittenden, of counsel for the appellant, John Paul Shelton

CERTIFICATE OF SERVICE

This is to certify that I have mailed a copy of the above and foregoing Motion to Reinstate Appeal to the office of the United States Attorney, Old Post Office Building, Atlanta, Georgia 30300, in a proper envelope with sufficient postage affixed thereto to insure delivery, this 9th day of January, 1975.

/s/ ROBERT R. CRITTENDEN
Attorney

MEMORANDUM BRIEF IN SUPPORT OF APPELLANT'S MOTION TO REINSTATE APPEAL

(Filed January 10, 1975)

(Formal Parts Omitted)

This Court has the power to reinstate this appeal. The Order dismissing the appeal did not state that it was with prejudice; indeed, the government did not request dismissal with prejudice in its motion to dismiss filed here on June 15, 1973. The basis of the motion was appellant's alleged fugitivity from justice from certain criminal proceedings initiated against him by the State of Georgia. The specific prayer in the government's motion is as follows:

> "WHEREFORE, it is respectfully requested that the appeal in this case be dismissed without prejudice to the appellant's right to re-open his appeal at some subsequent date."

The principal issues raised in this appeal involve basic constitutional rights and freedoms which may be raised at any time in a collateral attack, such as a post-conviction proceeding brought under 28 U.S.C. 2255. The United States Supreme Court has, in a similar but not identical situation, ordered an appeal reinstated to avoid possible injustice and the possibility of a collateral attack on the conviction at a future date. (*Gaca v. United States*, 411 U.S. 618, 93 S.Ct. 2156, 36 L.Ed.2d 541, text 542).

Appellant's claim of a warrantless and unconsitutional search and subsequent seizure of his property is more elaborately set forth in his Brief filed in this Court on June 1, 1973, and is cognizable in a post-conviction proceeding brought pursuant to 28 U.S.C. 2255. (*Kaufman v. United States*, 394 U.S. 217, text 231, 89 S.Ct. 1068, 22 L.Ed.2d 227, text 240).

This Court has broad powers to enter orders and writs in aid of its appellate jurisdiction, including the power to vacate an order dismissing an appeal and striking same from the Court's docket. Now that appellant is in custody of the United States government, the reason for dismissing (and thus not considering) his appeal no longer exists. Appeals have been heretofore decided on their merits, notwithstanding the appellant's fugitivity. (*Lannom v. United States*, 9 Cir. 1968, 401 F.2d 504).

This Court has held that an appellant does not lose his right to appeal by virtue of an escape from federal custody (*McKinney v. United States*, 5 Cir. 1968, 403 F.2d, text 58, 59). The *McKinney* Court states (text 59 of 403 F.2d):

> "(1,2) It is settled that an appeal from a judgment of a federal district court is a matter of right. Coppedge v. United States, 1962, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21; Brewen v. United States, 5 Cir. 1967, 375 F.2d 285. Moreover there is some authority for the proposition that federal appeals should not ordinarily be dismissed even where the appellant flees the jurisdiction. Eisler v. United States, 1949, 338

U.S. 189, 69 S.Ct. 1453, 93 L.Ed. 1897, (appellant fled United States); Smith v. United States, 1876, 94 U.S. 97, 24 L.Ed. 32 (appellant escaped); Bonahan v. State of Nebraska, 1887, 125 U.S. 692, 8 S.Ct. 1390, 31 L.Ed. 854, (appellant escaped); United States v. Dawson, 6 Cir. 1965, 350 F.2d 396, (appellant fled the jurisdiction, forfeiting bond)."

An appeal in a federal criminal case is a matter of right protected by the due process under the Fifth Amendment to our Constitution. In *Coppedge v. United States*, 369 U.S. 438, text 442, 82 S.Ct. 917, 8 L.Ed.2d 21, text 26, the Court stated:

> "Present federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter or right . . . The only requirements a defendant must meet for perfecting his appeal are those expressed as time limitations within which various procedural steps must be completed . . . ."

An escape from federal custody has been determined not to strip the case of its character as an adjudicable controversy, even though the appeal is dismissed on the basis of appellant's current fugitivity (*Molinaro v. New Jersey*, 396 U.S. 365, 90 S.Ct. 498, 24 L.Ed.2d 586, text 588).

Appellant's counsel has been unable to locate any federal appellate decision holding that a fugitive appellant forever and irrevocably loses his right of

appeal after being returned to custody. In *United States v. Brown*, 5 Cir. 1972, 456 F.2d 1112, text 1113-4, the appellant has absented himself from sentencing. This Court struck his subsequent appeal from the docket. After his custodial incarceration by a state, appellant petitioned here to reinstate his appeal. This Court exercised its appellate jurisdiction, and vacated and remanded his judgment and sentence with directions to the trial court.

SUMMATION

This Court clearly has the power to reinstate appellant's appeal. His Brief has been filed. He is in federal custody, actually serving the complained-of judgment and sentence. Nothing further remains, save filing of the government's brief and the requisite appendix. In furtherance of justice, and to activate the most orderly procedure for expeditious determination of appellant's substantial federal constitutional questions, this appeal should be reinstated.

Respectfully submitted,

CRITTENDEN & CRITTENDEN, P.A.
/s/ ROBERT R. CRITTENDEN
Robert R. Crittenden
103 Avenue A, N.W.
Winter Haven, Florida 33880
Telephone (813) 293-2161
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

This is to certify that I have mailed a copy of the above and foregoing Motion to Reinstate Appeal to the office of the United States Attorney, Old Post Office Building, Atlanta, Georgia 30300, in a proper envelope with sufficient postage affixed thereto to insure delivery, this 9th day of January, 1975.

/s/ ROBERT R. CRITTENDEN
Attorney

PETITION FOR REHEARING EN BANC

(Filed March 10, 1975)

(Formal Parts Omitted)

Appellant, John Paul Shelton, through counsel, requests the Court to grant a rehearing *en banc*, and to reverse the Order entered herein on February 24, 1975, denying motion to reinstate appeal, for the following reasons:

1.

A rehearing *en banc* should be granted to secure uniformity in this Court's decisions, and to afford equal protection of law to all litigants in similar circumstances. In *United States v. H. Rap Brown* (5 Cir. 1972) 456 F.2d 1112, this Court had ordered the appeal stricken from the docket, because the ". . . appellant,

H. Rap Brown, has disappeared and his present whereabouts are unknown" (Text 1114, footnote 1). Subsequently, this Court (Judges Wisdom, Coleman and Simpson) granted Brown's motion to reinstate appeal, upon a showing that he had been taken into custody in New York. In *McKinney v. United States* (5 Cir. 1968) 403 F.2d 57, a panel of this Court (Circuit Judges Bell and Morgan, and District Judge Guinn) held that McKinney did not irrevocably lose his right to appeal by virtue of an escape, stating (text 59): "It is settled that an appeal from a judgment of a federal district court is a matter of right . . ."

2.

The Court apparently overlooked the holding of *Coppedge v. United States* (1962) 369 U.S. 438, 8 L.Ed.2d 21, 82 S.Ct. 917, viz: "Present federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter or right . . . ." (Text 26, 8 L.Ed.2d). There has been no suggestion that Shelton intentionally waived this right, and waiver cannot be presumed. Even if the right was suspended or abated while he was a fugitive, it should be revived upon termination of fugitivity.

3.

The Court apparently overlooked the fact that the Government did not request dismissal of Shelton's appeal with prejudice, but only requested, in its motion filed herein on June 15, 1973, that the appeal be dismissed "without prejudice to the appellant's right to reopen his appeal at some subsequent date." In this

context, the Court has overlooked the application of *Gaca v. United States* (1972) 411 U.S. 618, 93 S.Ct. 2156, 36 L.Ed.2d 541, where the Supreme Court ordered an appeal reinstated in the Third Circuit where the Government did not oppose same, ". . . in order to avoid possible injustice and the possibility of collateral attack upon the conviction . . . ." (Text 542, 36 L.Ed.2d).

4.

The Court apparently failed to take into consideration that substantial questions are involved in this appeal, and the likelihood that the conviction ultimately will be reversed. At his jury trial and in his brief filed in this Court, Shelton maintains his innocence, as well as a violation of his fundamental constitutional rights.

5.

Molinaro v. New Jersey (1970) 396 U.S. 365, 90 S.Ct. 498, 24 L.Ed.2d 586, cited at page 3803 of this Court's February 24, 1975, Order, is authority for the proposition that an appeal may be dismissed on ground of fugitivity. *Molinaro* does not prohibit reinstatement of an appeal, upon termination of the fugitivity. The Supreme Court specifically stated that escape ". . . does not strip the case of its character as an adjudicable case or controversy . . . ." (396 U.S. at page 366). Moreover, the instant case is distinguishable in that *Molinaro* had already had the benefit of a direct appeal from his state conviction, to the Supreme Court of New Jersey, which had rendered a decision on the

merits. Shelton has never had any kind of an appeal on the merits.

6.

While this Court cited numerous cases (at page 3803 of the subject Order), holding that fugitivity is ground for unconditionally dismissing an appeal, it is respectfully submitted that this is not the issue rasied by Shelton's Motion to Reinstate. The Court overlooked the fact that none of the cases cited holds that fugitivity, after it has terminated, is ground for not reinstating the appeal. It is respectfully suggested that "unconditionally" dismissed does not mean "irrevocably" dismissed.

7.

The Court has apparently overlooked the fact that there is no reported decision involving an original direct appeal from a federal conviction, where this or any other United States Court of Appeals, having dismissed an appeal solely on ground of fugitivity, refused to reinstate the appeal upon termination of said fugitivity.

8.

The question involved here is of exceptional importance, and for that reason should be considered by the Court *en banc*. The Court's February 24, 1975, Order announces a new rule of law: a period of fugitivity forever and irrevocably deprives a convicted federal prisoner of the constitutionally protected right of

appeal. It is respectfully submitted that such an important question should be weighed by the full Court.

9.

At page 3803 of its February 24, 1975, Order, the Court indicates that subsequent to the *Molinaro* decision in 1970, every Circuit that heard appeals from fugitives, had unconditionally dismissed such appeals upon failure of the fugitive to surrender in a reasonable time (usually 30 days) or to show that he was not actually a fugitive. In making the foregoing statement, this Court overlooked the post-*Molinaro* case of *United States v. Brown*, supra, where this Court, on May 26 1971, ordered the appeal stricken from the docket because Brown ". . . has disappeared and his present whereabouts are unknown . . .", but set no time limit on reinstatement of appeal, ". . . on appropriate motion, if and when it should be made known to the Court that Brown is available and subject to any judgment which might be entered in this case" (456 F.2d at page 1114, footnote 1). On March 17, 1972, this Court reinstated Brown's appeal, upon a showing that Brown "is in the custody of the state of New York and thus within our jurisdiction." (456 F.2d at page 1114).

This Court's decision to reinstate Brown's appeal apparently did not turn on any culpability on Brown's part in abusing judicial processes, but on the simple question of whether and when he would be available and subject to any judgment which might be entered in this case. There is no indication that Brown's fugitivity was any less willful or less culpable than Shelton's.

10.

The Court has apparently overlooked the fact that judicial economy will not be served by refusing to reinstate this appeal. An examination of Shelton's main brief filed here in June of 1973, indicates the existence of substantial constituional questions which he will undoubtedly pursue in a collateral attack on the judgment. In *McKlemurry v. United States* (5 Cir. 1973) 478 F.2d 1185, text 1188, this Court ruled on a question that it technically could have avoided because "sound judicial husbandry dictates that we now consider the merits", etc. The appeal in the *Gaca* case, *supra*, was ordered reinstated in the interest of judicial economy, viz., to preclude a collateral attack. Judicial economy was no doubt the Government's reason for requesting dismissal of this appeal "without prejudice", in the first instance. Government counsel's failure to oppose reinstatement of appeal at the present time hopefully is due to a continuing regard for "sound judicial husbandry", such as the Solicitor General's Office had in mind in recommending reinstatement of appeal in the *Gaca* case, *supra*. In *United States v. Ryan* (5 Cir. 1973) 478 F.2d 1008, at page 1014, this Court (Jones Godbold and Ingraham, Circuit Judges) said:

> "For purposes of judicial economy — and in the likely event that Ryan will at some time seek relief under Sec. 2255 — we think it appropriate to comment on several related issues not raised directly by defendant's appellate brief."

11.

The Court indicates (page 3804 of the February 24, 1975, Order) that Shelton has offered no explanation for his conduct. Filed herewith and by reference incorporated herein is an affidavit by Shelton, in which he attempts to explain his conduct, apologize, and show mitigating circumstances. This affidavit, prepared by Shelton in the Atlanta Federal Penitentiary, indicates extenuating circumstances and that even if this Court now exercises a compassionate discretion by reinstating his appeal, Shelton has already been punished and chastised for his ill-advised fugitivity, in having his appeal suspended or interrupted for a period of several months while he waits in prison.

CONCLUSION

For the foregoing reasons, appellant respectfully moves the Court to grant a rehearing *en banc*, and to reinstate the appeal herein.

CRITTENDEN & CRITTENDEN, P.A.
/s/ ROBERT R. CRITTENDEN
Robert R. Crittenden
103 Avenue A, N.W.
P. O. Box 152
Winter Haven, Florida 33880
Telephone (813) 293-2161

ATTORNEY FOR APPELLANT

AFFIDAVIT OF COUNSEL

I HEREBY CERTIFY that the matters set forth in the above and foregoing Petition for Rehearing En Banc are true and correct to the best of my knowledge and belief.

/s/ ROBERT R. CRITTENDEN
Robert R. Crittenden

CERTIFICATE OF SERVICE

This is to certify that I have mailed two (2) copies of the above and foregoing Petition for Rehearing En Banc to the Office of the United States Attorney, Old Post Office Building, Atlanta, Georgia 30300, in a proper envelope with sufficient postage affixed thereto to insure delivery, this 7th day of March, 1975.

/s/ ROBERT R. CRITTENDEN
Attorney for the Appellant

AFFIDAVIT OF JOHN PAUL SHELTON, APPELLANT, IN SUPPORT OF PETITION FOR REHEARING EN BANC, ON MOTION TO REINSTATE APPEAL

(Filed March 10, 1975)

(Formal Parts Omitted)

John Paul Shelton, appellant in the above-styled case, in support of his petition filed herewith for

rehearing en banc on motion to reinstate appeal, deposes and says:

Affiant entered upon service of sentence in the above-styled case December 30, 1974. He is now confined in the United States Penitentiary in Atlanta.

The fugitivity on an unrelated state charge, which led to dismissal of appeal in the instant case, arose in the following manner:

On May 4, 1973, after the appeal in the instant case had been docketed in this Court, a six-count forgery indictment was returned against affiant in the Superior Court of Fulton County, Georgia, Case No. A-16925. Affiant was advised by counsel of the existence of the indictment, and appeared voluntarily for arraignment and trial on May 29, 1973, although no warrant or summons had been issued on said indictment, and no bond had been required or posted. Affiant remained in voluntary attendance at the state trial four days, until 4:30 p.m. on Friday, June 1, 1973, at which time he absented himself, during a recess, intending to return the following Monday prior to completion of the trial. At the time he absented himself, closing argument of counsel had been completed, but the trial judge had not yet charged the jury. Affiant did not anticipate that the jury's deliberation would commence before Monday.

There was no "escape" involved, as that term is ordinarily used. Affiant's departure was non-violent. He was not under physical restraint, neither was he under the legal restraint of any warrant, summons, or appearance bond.

Affiant absented himself from the trial for two reasons. First, he had been taken by surprise with the State's rebuttal evidence, and he wanted to locate two witnesses (J.W. West and N.H. Daniel) to explain said surprise evidence, hoping that the court would allow him to reopen his defense Monday morning. Second, affiant was suffering with ulcerative colitis, with attendant acute diarrhea, weakness and fatigue. This condition had been aggravated by stress of the four day trial. (The trial judge had kept unusually long hours, requiring affiant's presence between twelve and thirteen hours daily). Affiant had been in the Mayo Clinic for six weeks, where a course of treatment and medication for his condition had been formulated, which was being supervised by affiant's physician in Atlanta at time of the state trial (Dr. William C. Waters III, 1938 Peachtree Street, N.E., Atlanta, Georgia). Medication included lomotil, prednisone, codeine and metamucil, several times daily. Affiant's supply of this medication ran out Friday morning June 1, 1973, and he needed to get prescriptions filled for week-end use, as the sudden withdrawal of this medication, especially prednisone (a form of cortisone) would result in shock, internal bleeding, acute diarrhea, vomiting, and possible death.

On Saturday, June 2, 1973, affiant was surprised and dismayed to learn that in his absence, the trial judge had submitted the case to the jury, a verdict of guilty had been returned, and a forty year sentence had been imposed in absentia.

This unexpected development further aggravated affiant's physical and emotional problems and stress.

He ascertained from his counsel that no appeal bond would be set by the state trial judge, and that the Georgia Court of Appeals would not entertain a motion for appeal bond until the record was filed in that court. Affiant further ascertained from counsel and the Court Reporter (James R. West) that a stenographic transcript could not be obtained for at least eight months (actually, it took nearly nine months). Affiant directed counsel to prosecute an appeal in the state case, and this was done, the appeal record being filed in the Georgia Court of Appeals as soon as the transcript could be obtained. *John Paul Shelton v. State*, Case No. 49297, docketed in Georgia Court of Appeals February 25, 1974. Affiant's brief was timely filed in that Court, but the appeal was dismissed April 19, 1974, on ground that affiant was a fugitive. *Shelton v. State*, 131 Ga. App. 786, ____ S.E.2d ____. Affiant's counsel had argued in the state brief that if the trial court could sentence affiant in absentia, then he should be allowed to appeal in absentia.

Affiant has at all times maintained his innocence on both the state case and the instant case, and has been confident of a reversal of both convictions on appeal, if and when a ruling on the merits of the appeals can be secured.

Affiant not only knows that he is innocent both morally and legally on both charges, but also feels that misleading evidence which was obtained in an unconstitutional manner was used against him at both trials. For example, the Government at the trial of the instant case was permitted to impeach affiant by introducing into evidence a conviction for violation of

the Dyer Act that occurred in New Orleans in 1952, the alleged offense having occurred in 1950. The certified copy of judgment and commitment that was introduced into evidence, over objection, erroneously recited that affiant had counsel at the 1952 trial. Actually, the District Court in New Orleans had corrected the judgment in 1952 or 1953, by deleting the recital that affiant had counsel or that he waived counsel, but the certified copy introduced into evidence at the instant trial in Atlanta did not reflect that correction.

At the time of affiant's Atlanta trial, a motion to vacate the 1952 sentence was pending in the District Court in New Orleans, Case No. 24,253 in that Court. The motion was denied by the District Court without a hearing. Affiant's counsel perfected an appeal to this Court. This Court dismissed the appeal September 28, 1973, on ground that appellant (affiant) was a fugitive in the instant case and in the state case. *United States v. Shelton*, Case No. 73-1873 in this Court.

Affiant feels that he has been sufficiently punished for his panic-induced fugitivity, by having three appeals dismissed, the consequences of those dismissals being that he will be compelled to spend many months in prison awaiting rulings on the merits of said appeals, even if all of them should be reinstated today.

It is affiant's feeling that he is at least as much sinned against as sinning. The uncounselled 1952 New Orleans conviction and uncounselled appeal in 1953, for an offense that allegedly occurred 25 years ago,

was illegally used to hlep secure a conviction in the instant case; then, both convictions were used against affiant at his state trial. Many other errors occurred in the instant trial and the state trial, which affiant believes will eventually result in his complete exoneration in both cases, either by way of reinstatement of appeals, or collateral proceedings.

Affiant's failure to surrender was not due to a sense of guilt, but simply to a desire to preserve his health by avoiding prison as long as possible. His fugitivity was in the nature of self-defense against illegal prosecution tactics. Affiant feared that he would be unable in prison — especially a state prison — to obtain proper treatment and medication for his volatile ulcerative colitis. He had been warned by Mayo Clinic physicians and his Atlanta physician that proper environment, diet, and delicately balanced medication were imperative to control his illness; that inadequate or improper treatment would result in the necessity of a colostomy at the least, or death at the worst. Affiant presently is being treated, minimally and inadequately, for this condition in the federal prison. His health is deteriorating rapidily in absence of the intensive and balanced treatment available on the outside.

Affiant failed to surrender for the additional reason that he was advised by counsel, and believed, that from a strictly technical standpoint he was not obliged or required to surrender, unless and until this Court categorically ordered him to do so, at a specified time and place. The wording of the appeal bond required affiant to surrender to abide the sentence only if same were "affirmed" by this Court. The District Court held

that it had no authority under the terms of the bond to forfeit same. This Court, following dismissal of appeal and revocation of appeal bond, never ordered affiant to appear at a particular time and place to abide the sentence. Affiant was advised by counsel who was relying on *United States v. Brown*, 456 F.2d 1112, that upon his apprehension or surrender he would be able to have his appeal considered on the merits.

Affiant at no time intended to flee the country or become a "permanent" fugitive. When he was arrested December 25, 1974, in Orlando, Florida, within the jurisdiction of this Court, there was no violence or additional charges. During his fugitivity he made no attempt to dispose of real estate or long term mortgages which he owned, but continued to operate his real estate business as usual, by remote (telephone) control, through employees who worked for him before, during, and after his period of fugitivity, up to and including the present time.

Appellant is 57 years of age, married, with an adopted stepdaughter and eight grand children. He and his wife (married in 1958) have resided at 1856 Delowe Place, S.W., Atlanta, Georgia, since 1960. They own their home and a real estate business.

Affiant has learned the lesson that fugitivity is ill-advised and wrong, regardless of the circumstances which appeared at the time to justify it. He has suffered, and continues to suffer, the consequences which he brought upon himself by his panic-induced fugitivity.

Affiant believes that his appeal in this case is meritorious. He will be forever grateful if this Court will reinstate and consider same on the merits.

/s/ JOHN PAUL SHELTON
JOHN PAUL SHELTON
Affiant-Appellant

SWORN TO AND SUBSCRIBED before me at the United States Penitentiary in Atlanta, Georgia (Fulton County) this 3rd day of March, 1975.

/s/ G.A. WELLS
G.A. WELLS

EXCERPTS FROM CERTIFIED MEDICAL RECORDS FILED IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, IN CONNECTION WITH PETITION FOR REHEARING EN BANC, IN SUPPORT OF PETITIONER'S AFFIDAVIT

Certification of Medical Records Pursuant to Ga. Laws 1971, Page 441, Approved April 5, 1971.

The enclosed documents consisting of 25 pages constitutes an accurate reproduction of medical records pertaining to patient John Paul Shelton. * * * The original of these records is on file at Piedmont Hospital. I certify that these records are maintained under my care, custody and control and are kept in the usual and ordinary course of business at this Hospital. /s/ Beverly C. Wilford, Medical Record Ad-

ministrator, Piedmont Hospital. Sworn and subscribed to before me this 30 day of May, 1973. /s/ Ada Maye Coleman, Notary Public, Georgia State at Large.

Physician: William C. Waters, M.D.
Patient: Mr. John Paul Shelton * * *
Date of Admission: 8-29-71
CHIEF COMPLAINT: Ulcerative Colitis.

PRESENT ILLNESS: This 54-year old white male gives a history of "indigestion" for many years starting in 1961, and progressing to the development of profuse watery diarrhea, which persisted for years. He received a variety of medications. He was suspected of ulcerative colitis and was hospitalized at the Mayo Clinic in 1965 for a 6-week period and has subsequently been followed by Dr. David James. * * * Without treatment he has episodes of severe watery diarrhea occasionally with blood and fever associated with cramps and abdominal pain. The patient was started on Prednisone intermittently approximately eight years ago. His typical pattern is that when he has a flare-up of diarrhea he begins on 30 mg. of Prednisone daily, then slowly tapers to 0 over a 10-day period. * * * He takes 10 teaspoonfuls of Metamucil daily to prevent watery diarrhea, and takes one grain of codeine as needed, averaging one dose a day. He takes Lomotil intermittently, and has used antispasmodics in the past. He has had several courses of Azulfidine. He has moderatly frequent stomatitis * * * not associated with flareups of his colitis. The patient's typical episodes include nausea, discomfort, bleeding and diarrhea — not severe pain. He had a variety of problems with his rectum including at the time of a hemorrhoidectomy in 1962. He has severe

pain with proctoscopy and in 1965 had to require general anesthesia for proctoscopy, at the Mayo Clinic, at which time an ulcer was found. * * *

HISTORY: This 54 year old white male has a history of documented ulcerative colitis, probably beginning in 1961 or 1962 — he is admitted at this time for an inpatient proctosigmoidoscopy and barium enema, preparation for both of the above procedures being too severe for this patient as an outpatient. * * *

LABORATORY STUDIES: * * * Proctosigmoidoscopy to 21 cm. was essentially negative except for marked and striking proctitis to the first 2 cm. from the anal verge. * * * Barium enema was carried out and was interpreted as being compatible with ulcerative colitis with primary involvement in the cecum and ascending colon. The terminal ileum was noted to be somewhat rigid in its configuration, attributable most likely to pericecal thickening rather than to any primary granulomatous ileocolitis. The possibility of a 4 x 9 mm. polyp in the mid descending colon as well as 2-3 tiny proximal sigmoid colon polyps were suspected, and it was recommended that follow-up studies be done to confirm or deny the presence of these findings. * * *

DISPOSITION: At the time of discharge this patient was returned to his usual regimen of a low residue diet, Azulfidine and Lomotil p.r.n., Codeine grains one daily as needed for diarrhea and abdominal pain and was also given Kenalog Suppositories for his proctitis. He is to return to the office for further follow-up

as well as final reports on the studies obtained at the time of this admission.

FINAL DIAGNOSIS: 1. Idiopathic chronic ulcerative colitis. 2. Proctitis secondary to diagnosis #1.

PROGNOSIS: Fair.

/s/ WILLIAM C. WATERS, M.D.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1394

JOHN PAUL SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals abused its discretion in refusing to reinstate his appeal which had been dismissed on the ground that he was a fugitive.

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on two counts of interstate transportation and concealment of a stolen motor vehicle in violation of 18 U.S.C. 2312 and 2313. On February 2, 1973, he was sentenced to concurrent terms of five years' imprisonment on each count. Petitioner filed a notice of appeal and filed his brief with the court of appeals on June 1, 1973. The district court granted his motion for release pending appeal under a surety bond (Pet. App. 1a-2a).

On June 1, 1973, the same day that his brief was filed with the court of appeals, petitioner escaped from custody of the State of Georgia while a state court jury was deliberating at his trial on charges of forgery. He was subsequently found guilty on the forgery charges and was sentenced *in absentia* to imprisonment for forty years, whereupon the state court issued a bench warrant for his arrest (Pet. App. 2a).

On June 15, 1973, the government filed in the district court a motion for forfeiture of petitioner's appeal bond, on the ground that petitioner in the interim had escaped from state custody. The government also filed with the court of appeals a motion to dismiss petitioner's appeal, on the same ground. After a show cause hearing held on June 18, 1973, at which petitioner failed to appear, the district court determined that it lacked jurisdiction to order forfeiture of the appeal bond and that the motion should be directed to the court of appeals (Pet. App. 2a).

On June 18, 1973, the clerk of the court of appeals mailed to petitioner's counsel a notice advising petitioner of the government's motion to dismiss his appeal and stating that the motion would be presented to the court for disposition, together with any response petitioner might file, on June 25, 1973. At the request of his counsel, petitioner's time for responding to the motion was extended to July 3, 1973. On June 19, 1973, the government filed in the court of appeals a motion to forfeit petitioner's appeal bond. The government served petitioner's counsel with copies of the motion, in which the proceedings to date were summarized.

On July 3, 1973, petitioner's counsel filed in the court of appeals a response to the motion to dismiss. On August 2, 1973, the court of appeals conditionally revoked petitioner's appeal bond, conditionally dismissed the ap-

peal, and remanded the cause to the district court for a hearing at which petitioner was directed to appear in person (accompanied by counsel if he wished) and show cause why the conditional orders should not be made final. The court of appeals directed that copies of the judgment and of the district court's subsequent order setting the matter for hearing be served on petitioner's counsel and on the attorney who had represented petitioner at his state trial, that copies also be mailed to petitioner at his last known address, and that a transcript of the ordered hearing be certified to it. *United States* v. *Shelton*, 482 F. 2d 848, 849, certiorari denied, 414 U.S. 1075. The district court duly issued the order and served it as directed by the court of appeals (Pet. App. 3a).

Petitioner did not appear at the show cause hearing. Petitioner's counsel, who did appear, gave no explanation for petitioner's failure to appear, stating that he had talked with petitioner by telephone but was not aware of petitioner's whereabouts. The district court found that sufficient cause had not been shown and concluded that there was no reason why the conditional dismissal of appeal should not be made final (Pet. App. 3a). On November 12, 1973, the court of appeals, in an unreported order, made the above-mentioned conditional order final (Pet. App. 3a), and this Court denied certiorari, 415 U.S. 976.

On December 25, 1974—more than a year and a half after he had escaped from custody—petitioner was arrested by federal authorities in Orlando, Florida. On December 30, 1974, he began service of his federal sentence (Pet. App. 5a; Pet. 5).

On January 10, 1975, petitioner moved to reinstate his appeal in the court of appeals. The court denied this motion on February 24, 1975 (508 F.2d 797; Pet. App. 1a-5a), and subsequently denied his petition for a rehearing (511 F.2d 1192; Pet. App. 5a-6a).

Petitioner contends that the court of appeals abused its discretion in refusing to reinstate his appeal. As the court of appeals correctly recognized, however, it is entirely within the discretion of the court to dismiss the appeal of a fugitive unconditionally without waiting until he is returned or captured. See *Molinaro* v. *New Jersey*, 396 U.S. 365. Fugitive status "disentitles the defendant to call upon the resources of the Court for determination of his claims" (*id.* at 366). In *Allen* v. *Georgia*, 166 U.S. 138, this Court upheld as against a constitutional due process attack a state court's dismissal of the appeal of an escaped prisoner and its refusal to reinstate his appeal upon his later recapture. See also *National Union* v. *Arnold*, 348 U.S. 37, 43. "Disposition by dismissal of pending appeals of escaped prisoners is a longstanding and established principle of American law." *Estelle* v. *Dorrough*, No. 74-479, decided March 17, 1975, slip op. 3. See also *United States* v. *Tremont*, 438 F. 2d 1202 (C.A. 1); *United States ex rel. Bottoms* v. *Eberhardt*, 467 F. 2d 578 (C.A. 5); *United States* v. *Swigart*, 490 F. 2d 914 (C.A. 10); *Brinlee* v. *United States*, 483 F. 2d 925 (C.A. 8); *United States* v. *O'Neal*, 453 F. 2d 344 (C.A. 10).

Here, moreover, the court of appeals gave petitioner a reasonable opportunity to preserve his appeal by appearing in the district court on remand and showing why the appeal should not be dismissed. He failed to appear. Indeed, he remained a fugitive for nearly 16 months thereafter.[1] In these circumstances, the court of appeals did not abuse its discretion by failing to reinstate the appeal after petitioner was apprehended.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

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[1]Petitioner's reliance upon *Starke* v. *United States*, 338 F. 2d 648 (C.A. 4) is unpersuasive, since in *Starke* it was the oversight of the defendant's attorney, rather than the defendant's decision to flee the jurisdiction and subsequent capture, which required reinstatement of the appeal.